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*In the Supreme Court of the United States*

OCTOBER TERM, 1979

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**No. 79-631**

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THE STATE OF OKLAHOMA,  
*Petitioner,*

VERSUS

C.M.G., a juvenile,  
*Respondent.*

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA**

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November, 1979

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### **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

*To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

The Petitioner prays that the Petition of the State of Oklahoma for a Writ of Certiorari for review of the judgment of the Court of Criminal Appeals of the State of Oklahoma entered in the above case on May 1, 1979, be denied.

### **QUESTION PRESENTED**

Whether the Chilocco Reservation is "Indian country" within the meaning of 18 U.S.C. § 1151.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to 18 U.S.C. § 1151; Act of May 2, 1890, 26 Stat. 81, § 12; and Act of June 16, 1906, 34 Stat. 267, § 20, cited in petitioner's brief, this case involves the following constitutional and statutory provisions which are set out in the Appendices to this brief: 18 U.S.C. § 1153; 18 U.S.C. § 3242; Treaty of July 19, 1866, 14 Stat. 799, 804; Act of May 17, 1882, 22 Stat. 68, 85; Act of March 3, 1893, 27 Stat. 612, 642, § 10; Act of May 2, 1890, 26 Stat. 81, § 1; Act of June 16, 1906, 34 Stat. 267, § 1; Ok. Const., Art. 1, § 3; and Exec. Order, July 12, 1884 (Kappler, Laws and Treaties, Vol. 1, 842).

### ARGUMENT

The Respondent contends that the opinion of the Court of Criminal Appeals of the State of Oklahoma in *State v. C.M.G.*, 594 P.2d 798 (Okla. Cr. 1979), does not decide a substantial federal question. Further, the opinion is entirely in accord with applicable decisions of this Court.

The only federal question involved in *C.M.G.* was whether the Chilocco Indian School constituted Indian country as defined by 18 U.S.C. § 1151, the parties having agreed that if Chilocco is Indian country, then the United States has exclusive jurisdiction to prosecute for the murder of a Ponca youth, pursuant to 18 U.S.C. § 1153 (Appendix A) (see State's Petition, p. A-1). The Oklahoma Court of Criminal Appeals concluded that Chilocco is Indian country as defined by U.S.C. § 1151(b).

The *C.M.G.* decision does not involve a "substantial" federal question because the unique legal history of the tract of land in question sets the Chilocco Indian School apart from other Indian schools across the country. The Chilocco Reservation is situated in that portion of northern Oklahoma popularly known as the Cherokee Outlet in pre-statehood days. The Cherokee Nation owned these lands in fee, but by Treaty of July 19, 1866 (14 Stat. 799, 804) the Cherokee Nation authorized the United States to purchase portions of the Outlet as needed for the settlement of friendly Indians (Appendix B). The Chilocco Reservation was created by Executive Order on July 12, 1884 (Appendix C) for the settlement of friendly Indians pursuant to the 1866 Treaty. The Chilocco Indian School was established on a portion of this tract of land pursuant to Act of May 17, 1882, 22 Stat. 68, 85 (Appendix D). The Cherokee Nation agreed to sell the entire Cherokee Outlet to the United States in 1891. The Act of March 3, 1893, 27 Stat. 612, 642 (Appendix E), ratifying the agreement expressly provided that the Chilocco Reservation was to continue to be reserved for the purpose set out in the 1884 executive order, i.e., the settlement of friendly Indians.

There is no basis whatsoever in the opinion of the Court of Criminal Appeals for the State's assertion that the case holds that "land on which is located an Indian School constitutes a dependent Indian community because Indians reside there and the use of that land has been reserved for an Indian school." (State's Petition, p. 10)

While the Oklahoma Court of Criminal Appeals considered a variety of factors demonstrating a special relationship between the Indian inhabitants of Chilocco and the



Federal Government (State's Petition, p. A-9), the court emphasized that the most persuasive factor was that the tract of land was specifically reserved for the settlement of friendly Indians by an Executive Order later reaffirmed by federal statute (State's Petition, p. A-9). Since most Indian schools have been established on tracts expressly set aside for educational purposes, the Chilocco School involves a unique set of circumstances, thus making the *C.M.G.* decision one of dubious precedential value with regard to other Indian schools.

The State apparently additionally argues that the question resolved in *C.M.G.* is a "substantial" federal question by asserting that the opinion stands for the proposition that the State has no jurisdiction over crimes "committed on lands associated with Indians but which do not constitute Indian country." (State's Petition, p. 11). The State simultaneously asserts that the Oklahoma Organic and Enabling Acts granted the State jurisdiction over Indian country lands unless one specific tribe possessed territorial jurisdiction over the tract in question (State's Petition, p. 9).

In fact the *C.M.G.* opinion does not stand for the proposition that the State has no jurisdiction over crimes committed by Indians "on lands associated with any group of intertribal Indians." (State's Petition, p. 10). Rather, as already noted, the Oklahoma Court of Criminal Appeals focused its attention on the legislative history of the Chilocco Reservation, the fact that the lands were expressly reserved by executive order later reaffirmed by statute for the purpose of the settlement of friendly Indians, and the fact that the history of the lands has been consistent with that purpose (State's Petition, p. A-9, A-11).

Furthermore, the present lack of state jurisdiction over Chilocco is consistent with the jurisdictional scheme set out in the Oklahoma Organic and Enabling Acts. Pursuant to § 1 of the Organic Act, Act of May 2, 1890, 26 Stat. 81 (Appendix F) the Cherokee Outlet became part of Oklahoma Territory, as opposed to Indian Territory, when the United States purchased the Outlet from the Cherokee Nation in 1893. Section 12 of the Organic Act extended the jurisdiction of the territorial courts to all controversies arising between Indians except "controversies arising between Indians of the same tribe, while sustaining their tribal relations." Thus, when the jurisdiction of the territorial courts was transferred to the state courts pursuant to the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 277 § 20, state courts likewise failed to obtain jurisdiction over controversies between Indians of the same tribe occurring in Indian country. Section one of the Enabling Act (Appendix G) further expressly preserved federal jurisdiction over Indians and their lands. As required by this provision the state constitution contains a disclaimer regarding federal control of Indian and unappropriated public lands. Oklahoma Constitution, Art. 1, § 3 (Appendix H). This jurisdictional scheme does not grant the State jurisdiction over Indian country lands subject to the territorial jurisdiction of more than one tribe and located in the former Oklahoma Territory.

Finally, the State has failed to identify any prior decisions of this Court on related issues inconsistent with the ruling of the Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals carefully reviewed all relevant decisions of this Court concerning the definition

of Indian country, and reached a conclusion consistent with these cases, particularly the cases of *United States v. Pelican*, 232 U.S. 449 (1914); *United States v. McGowan*, 302 U.S. 535 (1938); and *United States v. John*, \_\_\_ U.S. \_\_\_, 57 L.Ed.2d 489 (1978) (State's Petition, p. A-6, A-8 - A-10).

### CONCLUSION

The State has failed to present sufficient grounds for issuance of a writ of certiorari. The decision in *C.M.G.* did not resolve any substantial federal question. Rather it represents a narrow holding to the effect that an Indian school situated on a tract of land expressly set aside for the settlement of friendly Indians by executive order later reaffirmed by Congressional enactment constitutes a dependent Indian community. This decision does not result in a jurisdictional void since 18 U.S.C. §§ 1153 and 3242 expressly confer exclusive jurisdiction on the Federal Government over major crimes committed by or against Indians occurring on Indian country lands.<sup>1</sup> Further, on June 27, 1979, a Court of Indian Offenses was established in order to enforce misdemeanor crimes involving Indians occurring on Indian country lands in western Oklahoma. 44 Fed. Reg. 37503 (1979). In view of the lack of precedential effect of this case on other Indian schools and in view of the consistency of the opinion

<sup>1</sup> Since the issuance of the *C.M.G.* decision the United States Attorney has already prosecuted an Indian for an assault with a dangerous weapon at the Chilocco Indian School. *United States v. E. H.*, Cr. No. 79-1361 (D.C. Okl., Information filed Aug. 21, 1979).

with the decisions of this Court concerning the definition of Indian country, Respondent prays that this Court will deny the Petition for Certiorari.

Respectfully submitted,

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November, 1979

### **CERTIFICATE OF SERVICE**

I, Barry Benefield, one of the attorneys for C.M.G., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this \_\_\_\_\_ day of November, 1979, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the following attorneys for the Petitioner:

Jan Eric Cartwright and

John F. Fischer, II

Office of Attorney General of Oklahoma

112 State Capitol Building

Oklahoma City, Oklahoma 73105

by placing same in the United States Mail postage fully prepaid.

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Barry Benefield

Attorney for Respondent

## **APPENDICES**

## **APPENDIX A**

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18 U.S.C.

**§1153. Offenses committed within Indian country**

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

**§3242. Indians committing certain offenses; acts on reservations**

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

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## **APPENDIX B**

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### **TREATY WITH THE CHEROKEES**

July 19, 1866, 14 Stat. 799, 804

. . . ARTICLE XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.

Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

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## **APPENDIX C**

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Exec. Order, July 12, 1884 (Kappler, Laws and Treaties, Vol. 1, 842)

### **EXECUTIVE ORDERS RELATING TO RESERVES**

#### **Chilocco Industrial School Reserve**

It is hereby ordered that the following described tracts of country in the Indian Territory, viz, sections 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, and the east half of sections 17, 20, and 29, all in township No. 29 north, range No. 2 east of the Indian meridian, be, and the same are hereby, reserved and set apart for the settlement of such friendly Indians belonging within the Indian Territory as have been or who may hereafter be educated at the Chilocco Indian Industrial School in said Territory.

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## APPENDIX D

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Act of May 17, 1882, c. 163, 22 Stat. 68, 85

. . . And the Secretary of the Interior is hereby authorized to cause to be constructed, at a point in the Indian Territory adjacent to the southern boundary of the State of Kansas and near to the Ponca and Pawnee reservations, and upon a section of land suitable in quality and location for the industrial purposes of said school, which section of land is hereby reserved for said purpose, a building suitable in size and convenience for the instruction and care of one hundred and fifty Indian children, and shall cause to be instructed therein, in the English language and in industrial pursuits, the children of such of the Indian tribes located in the Indian Territory as are least provided for under existing treaties or laws; and for this purpose there is hereby appropriated the sum of twenty-five thousand dollars, or so much thereof as may be necessary, to be immediately available: Provided, That not exceeding fifteen thousand dollars of this sum shall be expended in the erection, completion, and furnishing of said building. . . .

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## APPENDIX E

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Act of March 3, 1893, c. 209, 27 Stat. 612, 642, § 10

Sections thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and the east half of sections seventeen, twenty and twenty-nine, all in township numbered twenty-nine north, of range numbered two east of the Indian Meridian, the same being lands reserved by Executive order dated July twelfth eighteen hundred and eighty-four, for use of and in connection with the Chillico Indian Industrial School, in the Indian Territory, shall not be subject to public settlement, but shall, until the further action of Congress, continue to be reserved for the purposes for which they were set apart in the said Executive order. And the President of the United States, in any order or proclamation which he shall make for the opening of the lands for settlement, may make such other reservations of lands for public purposes as he may deem wise and desirable.

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## APPENDIX F

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Act of May 2, 1890, c. 182, 26 Stat. 81, §1

. . . Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished and the President shall make proclamation thereof, said outlet shall thereupon and without further legislation, become a part of the Territory of Oklahoma. . . .

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## APPENDIX G

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Act of June 16, 1906, 34 Stat. 267 § 1. Admission of Oklahoma and Indian Territory as State

That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

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## APPENDIX H

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Ok. Const., Art. 1, §3

Unappropriated public lands—Indian lands—Jurisdiction of United States

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the State shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.